Supreme Court, U.S.
FILED
SEP 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1597

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

THE BOARD OF EDUCATION OF THE WESTSIDE COMMUNITY SCHOOLS (DIST. 66) *et al.*,
Petitioners,
v.
BRIDGET C. MERGENS, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

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WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF *AMICUS CURIAE* OF THE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*

The National School Boards Association (NSBA) is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school board of the Virgin Islands. Established in 1940, NSBA is the only major educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of this nation's public school children.

Nearly all public school districts receive federal financial assistance and, therefore, are subject to the requirements of the Equal Access Act, 20 U.S.C. §§ 4071-4074 (Supp. 1989). In addition, all public school districts are subject to the free speech clause and the establishment of religion clause of the first amendment.

The court of appeals decision removes the discretion of school districts to make decisions about the type of clubs they wish to sponsor. As the law now stands, a school's only safe alternative is to refuse to allow any club or organization to meet during the school day in order to assure that the school does not violate the constitutional or statutory rights of any child.

This brief is filed with the consent of counsel for petitioners and respondents. A letter granting universal consent to all *amici curiae* is on file with this Court.

ISSUES PRESENTED FOR REVIEW

1. Does the Equal Access Act unconstitutionally establish religion?

2. Did the Court of Appeals err in its broad interpretation of "noncurriculum related"?

3. Does Petitioners' student activities program violate respondents' free speech rights?

STATEMENT OF THE CASE

Amicus incorporates by reference thereto the statement of the case contained in brief by Petitioners.

ARGUMENT

I. INTRODUCTION.

Public institutions often find themselves in the position of having to choose between violating free speech or free exercise rights of individuals and risking establishing religion. Because of the unique nature of the public schools, these risks are even greater than in other forums. Also, because of the unique nature of the public schools, many establishment of religion cases involve public schools. *E.g., Abington School District v. Schempp*, 374 U.S. 203 (1963) (scripture reading and reciting Lord's Prayer in classrooms); *Engel v. Vitale*, 370 U.S. 421 (1962) (reciting in classrooms prayer written by state); *McCollum v. Board of Education*, 333 U.S. 203 (1948) (religion classes as part of curriculum). In addition, a number of "exceptions" to an unfettered free speech right have been drawn in school cases. *E.g., Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988); *Bethel School Dist. v. Fraser*, 106 S. Ct. 3169 (1986).

The Equal Access Act makes it unlawful for any public secondary school which receives federal funds and operates a "limited open forum," to deny "equal access" to students "who wish to conduct a meeting within that limited open forum on the basis of religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. § 4071(a). A school operates a "limited open forum" if it allows one or more "noncurriculum related" clubs to meet in the school during "noninstructional time." *Id.* at § 4071(b).

The first version of the Act designed by many of its sponsors to bring prayer back to the schools was substantially reworked, with the assistance of drafters from the American Civil Liberties Union, the National Education Association and others seeking to limit the religious effect of the Act and place the schools in a passive role of

assuring that all students have an equal right to expression. 130 Cong. Rec. S8338 (daily ed. June 27, 1984).

Much of the impetus for the Act came from two court decisions. Shortly before passage of the Act, the Third Circuit Court of Appeals in *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), overturned a district court decision requiring the school to allow religious clubs, under a "free speech" theory, to meet in the schools during the "activity period." The circuit court held that elementary and secondary level schools may not allow religious groups to meet because allowing such conduct during school hours gives the "impression" to young students that the school is sponsoring the religion, even though the school may in fact only be attempting to guarantee free speech rights of all students. The court held that the establishment clause holds a higher rank than the free speech clause, and therefore, must take precedence when the two clauses conflict.

Earlier, the Fifth Circuit in the case of *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1158 (1983), reached the same conclusion. However, unlike the Williamsport School District, the Lubbock district had for many years prior to the adoption of its "open access" policy, officially sponsored religion by allowing Bible readings in the classroom, prayers over loudspeakers in the school, school assemblies with evangelistic speakers and distribution of Gideon Bibles to students.

The case at bar raises the question of the constitutionality of the Equal Access Act and the question of whether this Court's decision in *Widmar v. Vincent*, 454 U.S. 263 (1981), applies to secondary schools. As to the first question, under this Court's decision in *Lemon v. Kurtzman*, 402 U.S. 602 (1971), a state policy or practice first, must have a secular purpose, second, must have a primary effect that neither advances nor inhibits religion and third, must not foster an excessive government entanglement with religion. *Amicus* submits that the Act does not pass

the first prong of the test, and its ability to satisfy the second prong depends on whether the Court agrees with the court of appeals' interpretation of "noncurriculum related." If that interpretation is incorrect, the decision should be reversed, because under a narrower reading of the statutory language, the school district is not operating a "limited public forum" and thus, is not subject to the requirements of the Act. If the court's interpretation is correct, the Act has the primary effect, as applied to religious clubs, of advancing religion.

Finally, *Amicus* requests that the Court address the question of whether the *Widmar* standard applies in the public secondary school context and, if so, whether Petitioners have violated that standard. *Amicus* submits that although *Widmar* may apply to school districts in some circumstances, the standard to be applied in determining whether a school is operating a "limited open forum" is not the same as that in a university. *Amicus* further contends that Petitioners were not operating a "limited open forum" in this case and, therefore, are not subject to *Widmar*.

II. THE EQUAL ACCESS ACT IS FACIALLY UNCONSTITUTIONAL.

A. Congress Did Not Have a Secular Purpose in Passing the Act.

Since its decision in *Lemon v. Kurtzman*, this Court has held that a law must have a secular purpose in order to pass constitutional muster. The three-pronged test in *Lemon v. Kurtzman* requires in addition to a secular purpose, that the "principal or primary effect [of the law] must be one that neither advances nor inhibits religion" and, finally, the statute must not foster "an excessive entanglement with religion." *See, e.g., Stone v. Graham*, 449 U.S. 39 (1980) (posting of the Ten Commandments in public school classrooms); *Wallace v. Jaffree*, 472 U.S. 38 (1985) (moment of silence for prayer and silent meditation); *Epperson v. Arkansas*, 393 U.S. 168 (1968) (statute barring teaching of evolution); *Edwards v. Aguillard*, 482 U.S. 578 (1987) (statute forbidding teaching of evolution); *Aguilar v. Felton*, 473 U.S. 402 (1985) (use of Chapter I funds to pay teachers providing services on religious school premises).

In *Wallace* the Court opined that the *Lemon* test does not require the intent to be entirely secular, but it found that the Alabama legislature's "intent to return prayer to the public schools is, of course, quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the school day." 472 U.S. at 59. The Court noted that an earlier Alabama law on the subject of moment of silence would have protected that right; thus, there was no reason to add the words "and voluntary prayer" except to evidence the state's "endorsement" of religion and prayer. "Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion." *Id.* at 60.

Similar facts are evident with respect to the Equal Access Act. There was no reason to include the word "religious" in the Act if, indeed, its purpose was to grant equal access to *all* groups. The Congress' debate on the Act belies its avowed intent to codify the free speech clause as to elementary and secondary schools. And, unlike the situation in *Wallace*, the Court need not resort to testimony in court after passage to determine the intent of the Act's sponsors. The intent is apparent from the legislative history itself.

The bill that was ultimately passed as the Equal Access Act was an amended version of a bill introduced by Senators Denton and Hatfield which read as follows:

> Denton-Hatfield Amendment No. 3152 to provide that it shall be unlawful to deny equal access to students in public secondary schools who wish to meet voluntarily for religious purposes and to provide district courts with jurisdiction over equal access violations. 130 Cong. Rec. S8331 (daily ed. June 27, 1984).

Although the bill that finally passed as the Equal Access Act broadened the coverage of Denton-Hatfield Amend-

ment No. 3152, the sole interest of its sponsors, and of most of those who voted for the Act, was in providing access to religious groups and overturning the effect of the decisions in *Williamsport* and *Lubbock*. Senator Denton on a number of occasions during floor debate, as exemplified in the statements set forth below, made it clear that the intent of both his original bill and the bill which ultimately passed, was to bring religion and prayer back to the public schools.

> Back to the discrimination which this amendment would eliminate. I emphasize that the discrimination involved applies only to religious activities, that the amendment before us applies only to religious activities. . . .
>
> There is broad support for equal access because it is a fundamentally fair, well drafted, and reasonable approach to the problems of religious expression in public schools. *Id.* at S8336.
>
> The question before us is whether or not we are going to continue to exist in the condition which began in 1962-63 and which prohibits the mention of the word "God" in the Jewish, Moslem, Christian, or whatever context, in a reverent, orderly sense, in a sense of assembly, if you will, voluntary on the part of the students. Are we going to restore that right in public schools, or are we going to continue to maintain the situation to which the great majority of Americans of all faiths object, in which the name of God cannot be mentioned except profanely in public schools?
>
> I believe that that basic question is that which underlies the yea or nay on the two amendments. . . .
>
> I want to go back to the underlying amendment's purpose in order to discuss the one under consideration now, which is a perfecting amendment.
>
> The underlying amendment focuses on religious speech for the simple reason that it is religious speech which has been singled out for censorship in public schools. Please let us not forget that as we consider this matter. *Id.* at S8348.

The event that took place in 1962-63 to which Senator Denton refers is, of course, this Court's decision in *Engel v. Vitale*, 340 U.S. 421 (1962), which held that a public school's practice of allowing prayer in the classroom violates the establishment clause. Members of the House, too, commented on that decision. *See* 130 Cong. Rec. H7726 (daily ed. July 25, 1984) (statement of Rep. Bonker).

During the time during which Congress was debating the bill, Senator Denton was encouraging his colleagues to vote for the measure in order to get a religious foot in the door. "A sealed door has had its seal broken . . . We can probably get it to grade schools." *New York Times*, July 25, 1984, *printed in* 130 Cong. Rec. at H7728 (daily ed. July 25, 1984).

Only a handful of members and senators who participated in the debate expressed support for the bill because it granted equal access to *all* groups. The tenor of the argument was that religion should be allowed back in the schools. Senator Dixon, for example, stated:

> Mr. President, as a co-sponsor of the amendment to permit equal access for student religious groups, I urge my colleagues to support the amendment.
>
> My position on this issue is the same today as it was back in March 1984 when the Dixon amendment included a similar provision in the silent school prayer and silent reflection amendment to Senate Joint Resolution 73. . . .
>
> Mr. President, this is a good amendment. Its time has come. I sincerely believe that we should have an equal access provision that permits high school students who want to discuss religious matters to come together on a voluntary basis in the public schools to follow the dictates of their own conscience and their own religious desires. This amendment does just that. 130 Cong. Rec. S8338 (daily ed. June 27, 1984).

Similarly, in the House, Representative Clinger argued fervently on the issue of why religion should be brought back into the schools.

> We must strive to keep these facts [citing examples of religion in other aspects of public life] in mind. Religion and the belief in God helped to shape and mold our great Nation. The proof is in our art, our literature, and in our Government institutions. Must we now, as political descendants of our devoutly religious Founding Fathers, ignore the rights of individuals to religious freedom?
>
> Please, I strongly urge you to vote for the equal access resolution today. If you may have trouble deciding, reach into your pockets and grab a coin, for on that coin are four simple words which tell the whole story of our proud Nation. Those are the words "In God We Trust." If this Nation truly believes that, then surely in God we Americans do trust. *Id.* at H7730 (daily ed. July 25, 1984).

Senator Hatfield, undoubtedly realizing the fact that such remarks could raise questions as to the intent of the Congress, stated:

> The Senator from Alabama [Denton] has spoken about religious activities as such and the circumscribing of those religious activities. I believe you can equally present this case as purely a matter of freedom of speech and freedom of assembly. Religion might be a secondary consideration. . . . *Id.* at S8337 (daily ed. June 27, 1984).

Senator Hatfield then cited several cases "where a very narrow interpretation of the Constitution has, in effect, impinged upon the freedom of speech of students." *Id.* One of the cases cited by Hatfield and by other senators during other times in the debate is a case which is likely the primary moving force behind the Equal Access Act, *Lubbock Civil Liberties Union (LCLU) v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983).

Although described by Senator Hatfield and others as an "equal access" case, an examination of the history of the case shows that the "equal access" aspect of the case was but the last resort by the school district in its attempt to bring prayer into the schools—much in the

same way as the Congress has attempted to bring prayer to the schools through the Equal Access Act. Initially, the district had a practice of reading prayers over loudspeakers, allowing silent prayers in the classroom, holding Bible readings in school and allowing distribution of Gideon Bibles to students. A court challenge filed by the L.C.L.U. motivated the district to alter its religious practices. Then the district adopted a policy which permitted supervised voluntary meetings of student groups before and after school hours for any "education, moral, religious or ethical purposes." The Fifth Circuit held the new policy to be unconstitutional because the primary purpose of the policy was religious and its primary effect was to advance religion.

Also belying the argument that the Act's intent is primarily to protect free speech rights, is the discussion of the other types of groups which would be permitted to meet under an equal access policy. Senator Gorton asked Senator Hatfield, the floor manager of the bill, about the status of gay rights activist school organizations in the limited open forum. Hatfield expressed reservations as to whether the bill requires a school to allow such an organization on school premises. The colloquy continued as follows:

> Mr. Gorton. I gather the summary of what the Senator has said is that the creation of a limited open forum does not require that student organizations be permitted for any speech purpose whatsoever; that at least with the perfecting amendment of Senator Danforth, if the school finds that the prohibition of an organization is necessary or advisable to maintain order and discipline on school premises, they can prohibit the formation of a student organization in spite of the limited open forum, even though that student organization is only going to engage in talk and not in any form of action or physical disruption whatsoever.
>
> Mr. Hatfield. The answer to the Senator's question is "yes," but I come back to the basic purpose and the reason we have this whole matter coming

> up in the Senate is for none of those issues but, rather, the simple proposition that schools today are increasingly limiting in the area of free speech. 130 Cong. Rec. S8344 (daily ed. June 27, 1984).

What Senator Hatfield apparently meant was that he wanted equal access, free speech rights, for religious groups, but not necessarily for pay rights groups or other groups which the senator believes are properly excluded from the schools.

A review of the entire debate makes clear that the overwhelming vote in favor of the bill was because the voters back home want prayer in the schools, not because the members and the senators wanted to protect free speech rights. In the words of Congressman Ackerman:

> But to paraphrase the words of the very perceptive child who refused to eat his sugar-coated vegetables, this bill looks like school prayer, it tastes like school prayer, and it smells like school prayer. 130 Cong. Rec. H7733 (daily ed. July 25, 1984).

Amicus submits that the Congress could pass a constitutional Equal Access Act, but, like the legislature in *Wallace v. Jaffree*, the Congress' intent in this case changed the color of the Act. The Equal Access Act is but establishment of religion in free speech clothing.

B. If the Court of Appeals' Interpretation of "Noncurriculum Related" Is Correct, the Act Has the Primary Effect of Advancing Religion.

The court of appeals determined that some of the clubs in question are "noncurriculum related" and, therefore, the school district operates a "limited open forum" and all clubs, including religious clubs, must be allowed to meet. As discussed below, *Amicus* submits that the court erred in its interpretation of the Act. However, if it is held that the court's broad interpretation of "noncurriculum related" is correct, then the Act goes beyond the parameters of the first amendment's free speech clause, and instead, becomes an affirmative obligation on school districts to allow religious groups to meet on their campuses. Such an interpretation renders the Act unconstitutional because it would have the primary effect of advancing religion.

This Court has not been mechanical in following the *Lemon* three-prong standard in all establishment of religion cases. *See, e.g., Marsh v. Chambers*, 463 U.S. 783 (1983). However, *Lemon* has been the standard in cases involving elementary and secondary age students.

> We have particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children. The government's activities in this area can have a magnified impact on impressionable young minds, and the occasional rivalry of parallel public and private school systems offers an all-too-ready opportunity for divisive rifts along religious lines in the body politic. *Grand Rapids School District v. Ball*, 473 U.S. 373, 383 (1985).

If this Court determines that the Act passes the first prong of the *Lemon* test, the next question is whether a school's compliance with the Act as regards religious meetings necessarily has a primary effect of establishing religion.

Amicus submits that it does not as long as "noncurriculum related" is read narrowly. If the district operates a "limited open forum" in the sense of this Court's decisions under the Constitution, *e.g., Widmar v. Vincent*; *Perry Educ. Ass'n v. Perry Local Education Ass'n*, 460 U.S. 37 (1983) (assuming those facts are possible in the context of a secondary school), there is very little possibility that students will perceive a religious club in that forum as school sponsored. But with facts such as those at bar, no inference other than that the school is sponsoring religion could be drawn.

Under the court of appeal's broad interpretation, clubs that have traditionally—traditionally, across the country, not only in this school district—been considered to be part of the educational program of the school will become part of the same category as the religious club. In other words, religious clubs will appear to have the same status

as clubs that formerly were sponsored by the school, whose activities were formerly directed by school employees. Whether one agrees or not that secondary school students are more "impressionable" than their university-age counterparts, given facts such as these, it would be understandable that both students and adults could perceive that the religious club had become part of the school's educational program.

Just as the presence of a public school teacher in a private school during the school day creates the perception of state advancement of religion, *Aguilar v. Felton*, 473 U.S. 402 (1985), the presence of a religious club in a public school has a similar effect when the clubs have traditionally been school-sponsored.

This case does not involve a university where clubs are allowed to meet in various places across the campus with little or no presence, much less involvement, of school personnel. This case involves one secondary school with one campus where traditionally only school sponsored, education related clubs have been allowed to meet after school under the direction of the school administration. Suddenly a religious club appears in that forum. How does the school overcome the perception that the clubs continue to be school sponsored, rather than merely "student initiated"? How does the school avoid the impression that the religious club is sponsored in the same manner as the school has sponsored the other clubs?

Thus, the primary effect of the circuit court's broad interpretation of "noncurriculum related" is nothing less than to advance religion. Under the Eighth Circuit's view, if a school allows student groups that do not have a direct connection to an academic subject, it has created a limited open forum and would not be allowed to differentiate between those clubs which support its educational mission and those which do not. If the school has traditionally sponsored nonacademic clubs, the perception of sponsorship would likely remain, and for all appearances, the religious club would be sponsored as well.

For example, in the present case if the circuit court's conclusion that Westside's chess club is noncurriculum related is accepted, the school must allow the religious student group to meet in the "limited open forum" under the Equal Access Act. The religious club would then meet during noninstructional time on school grounds on the same basis as Westside's thirty other groups and clubs which have been accepted by school officials as satisfying the goals and requirements of the school board policy on student groups. The board policy regards student clubs and organizations as "a vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." The policy requires that school-sponsored groups have a faculty sponsor and that the superintendent establish operational guidelines for clubs and organizations. The policy does not cover the formation of clubs, but in practice students wishing to form a club present their proposal to school officials who must then decide whether the club would comport with board policy. To allow a religious student group to meet in such a context could do nothing but convey the impression that the school supports the religious group, a result at odds with the requirement that the state refrain from acts which have the effect of advancing religion.

III. THE COURT OF APPEALS ERRED IN ITS INTERPRETATION OF "NONCURRICULUM RELATED."

If the Act is held to be constitutional, the question arises as to whether Petitioners violated the Act by refusing to allow Respondents to meet. The requirements of the Equal Access Act attach only when the school district is operating a "limited open forum," by granting an "opportunity for one or more 'noncurriculum related' student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The term "meeting" is defined as "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." *Id.* at § 4072(3).

Although the legislation is far from clear in this regard, it appears that the section which defines "meeting" does not limit school district discretion to designate what is a curriculum related *group*. Instead the definition refers to the *meetings* held by noncurriculum related groups. Thus, the activities of the student groups need not be *directly* related to a particular course.

Since the Act does not define "noncurriculum related," the legislative history must be consulted, bearing in mind Justice Scalia's admonition regarding the use of legislative history to determine intent. *Blanchard v. Bergeron*, 109 S. Ct. 939, 945 (1989). A look at the debate in both houses provides some insight on the issue. For example, during House debate Mr. Goodling, in a colloquy with himself stated:

> If we had had the time, for a further colloquy, Mr. Bonker was going to ask me the following question: One of the terms in the equal access amendment which needs clarification is "noncurriculum related student groups," which would trigger the equal access policy of this legislation. I would like to ask the gentleman from Pennsylvania [Mr. Goodling], as a former teacher and school administrator and principal cosponsor of the legislation how he would define "noncurriculum related student groups" for purpose of this measure.
>
> In answer to that question, I would say as follows: I would interpret "noncurriculum related" to encompass those student activities which are either of a type which schools usually do not sponsor or those activities which the school might sponsor but has not. Thus, there woud be a two-step inquiry to determine whether a meeting is noncurriculum related.
>
> First, is the subject matter of the meeting of a type, which a public school could sponsor? In other words, the meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category. A young Democrat or Republican club, private social organizations, or religious

> groups would not be of the type which a school could sponsor.
>
> Second, does the school or a school-teacher require or directly encourage student participation in such group in connection with curriculum course work?
>
> If both elements of this two-part analysis are satisfied, the meeting would be considered curriculum related and the equal access policy would not be triggered. 130 Cong. Rec. H7782 (daily ed. July 25, 1984).

In the Senate, the colloquy between Senator Gorton and Senator Hatfield indicates that the Senate, too, intended to leave the discretion on sponsorship of clubs to the school.

> Senator Gorton: Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?
>
> Mr. Hatfield: We in no way seek to limit that discretion. 130 Cong. Rec. S8342 (daily ed. June 27, 1984).

The court of appeals in this case cited a colloquy between Senators Gorton and Hatfield wherein Gorton suggested that a chess club would be noncurriculum related so that "If the school permits a chess club, it has thereby created the limited open forum which brings into effect the proscriptions of the act." *Id.* Senator Hatfield agreed. However, the colloquy is inconsistent on the question of chess clubs, because Senator Gorton (a clever cross examiner who ultimately voted against the bill) later asked Senator Hatfield, in the context of their discussion about school district discretion, "Could the school make the same determination [of relatedness to the curriculum] with reference to a chess club?" Hatfield answered: "I would not say that no school district could but I cannot readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another." *Id.*

At the least it would appear that the legislative history indicates that school districts should have broad discretion in determining what is curriculum related. At the most, the legislative history shows that the members did not define the term and left it to the courts to fashion an appropriate standard.

But a judicially formulated standard is entirely different from courts deciding, on a club-by-club basis that French is curriculum related but chess is not. The court's duty is to decide, based on some general standard, such as relationship to a "reasonable pedagogical goal," whether or not the district's action was arbitrary. *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988). The circuit court provided no standard in this case for its conclusion that the chess club and others which the court declined to name were noncurriculum related.

The Eighth Circuit based its determination that Westside High School is subject to the Equal Access Act and therefore must allow the student religious group to meet simply on its own assessment of whether any of the ten student clubs listed in Stipulation #17 of the Pretrial Order are curriculum-related. These groups include: Interact, Zonta, Welcome to Westside, Chess, Subsurfers, National Honor Society, Photography, Future Business Leaders of America, Student Advisory Board and Student Forum. Unlike the district court, the court of appeals did not accept the testimony of school officials that each of these student activities is related to the curriculum of Westside. Rather the Eighth Circuit believed that the school administrators characterized these clubs as curriculum-related in an "arbitrary" fashion as a means of circumventing the requirements of the Equal Access Act and denying the student religious group access to its facilities.

The appeals court "explained" its conclusion that WHS operates a limited forum with only one example. The court believed that the Chess Club is in fact not curriculum-related, because Westside offers no course in logic that would correspond with the asserted purpose of

strengthening logic and reasoning skills. (Whether Westside does in fact offer a course in logic is unclear since the district court mentions testimony that the Chess Club is an extension of Westside High School logic class.) The Eighth Circuit supported its view of the Chess Club with statements by members of Congress regarding whether a chess club would be considered curriculum-related under the Equal Access Act. *See* discussion, *supra* at 15. By this highly selective use of remarks appearing in the Act's legislative history, the court suggested that Congress had determined that a chess club could never be considered curriculum-related for Equal Access Act purposes. This is misleading since, as noted above, Senator Hatfield admitted that his conclusion about the curriculum relatedness of a chess club was based on his own inability to perceive a relationship, but that a school district had full discretion to reach the opposite conclusion. The court also stated that other unspecified groups at Westside are not related to the curriculum but failed to offer any justifications for this conclusion.

Ignoring Hatfield's comment that the Equal Access Act does not alter the full discretion of school districts, the Eighth Circuit regarded the school officials' testimony that each of the listed clubs is curriculum-related as mere "administrative decree" meant to exclude certain "unfavored" clubs. The appeals court suggested that the school officials' justifications were somehow dishonest or contrived as a means of frustrating the purposes of the Equal Access Act. In reality the testimony of the Westside officials comports with the views expressed by educators knowledgeable about student activities that these groups play an important role in the total learning experience offered by public schools and that they are regarded by some as an integral part of a school's curriculum.

> "Student Activities" have been called by many names over the years, and while the definition of "curriculum" historically has caused much debate, the appropriate title recognizing student activities lacks universal acceptance. The term "extracurricular ac-

tivities," an old term, gives the impression that they are outside the curriculum, but, as we enter the 1990's, student activities are recognized as a major part of the total school program.

The "Third Curriculum"—first termed by Robert W. Frederick—seems to be the best title, as it infers two additional curricula. The first is the coursework required to earn a high school diploma. The second curriculum allows for student choice, exploration, and specialization that include the electives that our students study to prepare for post-secondary study or work. Student activities represent a wide variety of school-sponsored teams, clubs, and organizations. Research reveals that it is in these activities that students learn most of the carry-over skills for adult life. While participating in student activities, our young adults learn critical lessons in leadership, followership, character, communications, teamwork, decision-making, self-worth, and individual potential. It is this level of learning that is called the Third Curriculum. Statement of Dale D. Hawley in Foreword to Biernat, N. and Klesse, E., *Student Activities* v (National Association of Secondary School Principals (NASSP) 1989).

Cocurricular activities vary from school to school. They are determined more by tradition, expectations, and policies of local schools and their respective publics than by written educational philosophies. Change, flexibility, and adaptability characterize the cocurricular component of the educational program perhaps more than the more traditional classroom component of American education.

Since the early 1900's schools have modified and expanded their programs of studies so that what was once considered extracurricular is now incorporated into the curriculum. Today it is common for schools to offer band, chorus, student publications, drama, and physical education-related experiences for credit. Furthermore, it is not uncommon for students to earn credits toward graduation for away-from-school work experience, school or community service, educational tours, leadership training activities, and cultural-

language studies abroad. Gholson, R. and Buser, R., *Cocurricular Activity Programs in Secondary Schools* v (NASSP 1983).

> [T]hose of us committed to student activities programs . . . know that the learning experience must go beyond the classroom to the space where the student council convenes, to the cheerleading camp, to the speech tournament, to the dark room frequented by the photography club, and the crowded chamber where the school newspaper is carefully edited. Statement of Terence J. Giroux in Christensen, D., *Managing School Activities* v (NASSP 1984).

These statements reinforce the idea well-accepted by many courts, including this Court, that decisions relating to curriculum matters are best left to local policymakers and administrators precisely because educational theories, philosophies, methodologies and goals are not rigid and static concepts susceptible to narrow judicial delineations. For example, Westside asserted that the Student Advisory Board and Student Forum constituted its form of student government which is generally related to teaching democracy and citizenship and to reinforcing a government course. These educational goals have been recognized as part of the learning experience associated with student councils, along with development of skills such as communication, leadership, goal identification, decision-making, planning and organization, implementation of ideas, problem solving and evaluation. *See* Ferguson, J., *Student Council Projects* v, 75 (NASSP 1982). Schools may seek to encourage the learning of such skills through different forms of student government. As explained by Ferguson in another publication, *Student Council Activity Resource Book* 1 (NASSP 1980):

> When America's schools were established one of their goals was to provide for the continuation of democracy. The student council was established to further that objective. If students are involved in making decisions which affect them, they will learn how the democratic process functions.

> Learning to make decisions is an important part of young people's development. Accepting the consequences of decisions is equally important. As students mature they must be given more responsibility and more involvement in making decisions which affect their lives.

Other schools have made leadership training, a "formal" course offering many of the same educational goals as those associated with student councils that are not classified as "courses" or "classes." *See* NASSP, *Developing a Student Leadership Class* (1977). In *Bethel School District v. Fraser*, 106 S. Ct. 3159 (1986), the school district sponsored a student assembly for the purpose of student government nomination speeches. This Court agreed with the school that the assembly was related to the educational mission of the school and not a "limited open forum." While no court would likely find an elective course in leadership training to be unrelated to the curriculum, under the court of appeals reasoning, it is possible that a court could find student government activities to be noncurriculum related even though the school's purpose for allowing a student council is to foster the development of the same life skills taught within the confines of a "class" in leadership. Such a result would clearly illustrate the wisdom of judicial deference to local school boards and administrators in making educational determinations.

Such deference would likewise be appropriate were a school to view its chapter of the National Honor Society as curriculum-related. The society was created in 1921 to encourage academic achievement while developing other characteristics essential to citizenship in a democracy, including character, service and leadership. *See* NASSP, *National Honor Society Handbook* 1 (1984). This Court itself has recognized that promoting the development of students as citizens and members of society is one of the most important functions of our educational system. *E.g., Bethel School District v. Fraser.* However, under the Eighth Circuit's approach, a court could determine that activities meant to inculcate such values are not curriculum-related based on its own view that the educational goals are too "broadly" defined.

One wonders how the circuit court in this case could make this determination about the WHS clubs given the fact that the school has chosen not merely to allow students to meet, but to sponsor each of the activities. The Eighth Circuit, however, totally omitted any discussion of the relevance of school sponsorship to the issue of curriculum relatedness. However, the sponsorship factor must be considered, because if the court of appeals is correct, the school will be forced under the Act, not only to allow the religious club to meet but also to cease its sponsorship of the other groups which are found by the court to be "noncurriculum related."

Section 802(c) of the Act provides:

> Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school *uniformly* [emphasis supplied] provides that—. . .
>
> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees. 20 U.S.C. § 4071(c).

The term "sponsorship" is defined in section 803(2) of the Act.

> The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting. *Id.* at § 4072 (2).

Of course the reason these two provisions are in the law is to avoid school-sponsorship of a religious club which would constitute establishment of religion. But, would a school violate the Act by sponsoring some noncurriculum related clubs and not sponsoring others. Although such a requirement seems nonsensical, it appears from the legislative history that Congress, in order to

assure that schools not sponsor religious clubs, has in the process also prohibited sponsoring of any other club deemed to be "noncurriculum related." In the colloquy between Senators Hatfield and Gorton, Senator Hatfield explains that "Sponsorship is forbidden, very tightly controlled, according to our lawyer's counsel." Senator Gorton then asks: "I understand and I appreciate that, Madam President. I think it would be very good to tighten control. But those strictures will apply to all noncurriculum related student activities which may use the open forum?" Senator Hatfield answered "That is correct." This part of the colloquy goes on at some length making it very clear that the intent was to control all "noncurriculum related" clubs. Finally Senator Gorton states: "So the question is whether it is curriculum related. If it is not curriculum related, the Senator's amendment is providing controls over the faculty and administration personnel considerably greater than are many school districts in the United States today, is it not?" Senator Hatfield's answer: "That is true." 130 Cong. Rec. S8342-43 (daily ed. June 27, 1984).

Therefore, the question of whether a particular club is "noncurriculum related" or not has an importance beyond whether a particular club must be allowed to meet on campus. The answer to that question will also determine whether the school and its employees can actively participate in the club or must merely stand by silently.

This Court has ruled on numerous occasions that it is not the province of the courts to make educational decisions. *E.g., Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562; *Bethel School District v. Fraser*, 106 S. Ct. 3169; *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Even in the university context where it has been held that the university cannot deny access based solely on its disagreement with the viewpoint expressed, it "legitimately may regard some subjects as more relevant to its educational mission than others." *Widmar*, 454 U.S. at 280.

The appeals court may not agree that chess is reasonably related to teaching of math, but that is not sufficient reason to overturn the school's curriculum decision. Courts should not substitute their own judgment for the judgment of school officials. *See, e.g., Wood v. Strickland*, 420 U.S. 308 (1973), holding that it is not the province of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion; *Board of Education of Rogers, Ark. v. McCluskey*, 458 U.S. 966 (1982), reversing the lower court holding that the school board unreasonably interpreted a rule against consuming alcoholic beverages; and *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), holding that courts, in assuring that the requirements of the Education for All Handicapped Children Act are met, must take care to avoid imposing their view of preferable educational methods upon states.

A passage in *Garnett v. Renton School Dist No. 403*, 874 F.2d 608 (9th Cir. 1989), is worth noting on this point. That case was originally decided on January 17, 1989, *Garnett v. Renton School Dist No. 403*, 865 F.2d 1121 (9th Cir. 1989), the court holding, *inter alia*, that refusing to allow a religious club to meet under the circumstances of that case did not violate the Equal Access Act. After the court of appeals rendered its decision in the case at bar, the Ninth Circuit amended its earlier ruling to add a discussion on the issue of whether the district operates a "limited open forum." Whereas the earlier opinion merely affirmed the district court's factual finding that the activities "are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related,'" *Id.* at 1127 (quoting district court, 675 F. Supp. 1268, 1274 (W.D. Wash. 1987)), the amended opinion expands on the role of the court in determining curriculum relatedness.

> [W]e respect the district's determination about which activities are curriculum related. Complete de novo review of every school district decision as to what is and what is not curriculum related would invite litigation from every student group denied a classroom for one reason or another, and is not necessary to effectuate the goals of the Act. Courts have always afforded school districts broad discretion in the management of school affairs, limited, of course, by any applicable constitutional or statutory principles. (Citations omitted.) The Equal Access Act does not expressly depart from this principle of deference to the judgment of local school officials. Congress must, therefore, be understood to have legislated in light of this principle. The legislative history supports this interpretation. 874 F.2d at 613-14.

As noted in *Garnett*, courts should not accept without question a final determination of the school district that it does not operate a limited open forum. They must examine the actions of the district, not just their words. In *Garnett* all activities were supervised by faculty and were "so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed 'noncurriculum related.'" In the case at bar every club had an active faculty sponsor who was paid extra compensation for such duties. Petition for cert. at 4. The school district provided ample evidence of the relationship of each club to the curriculum. *Id.* at 8-10. The court of appeals apparently does not accept the educational judgment that chess is related to mathematics and, therefore, substituted its own educational judgment for that of the school district.

The court of appeals also implied that Subsurfers, a scuba club, is not curriculum-related. Whether or not one agrees that sports and physical education are an important part of the curriculum, nevertheless, such activities are a part of most curricula in schools across the country. Furthermore, the legislative history makes clear that sports were considered by the Congress to be curriculum

related. House sponsor Goodling stated during debate: "[T]he meeting must be academic, athletic, or musical to be curriculum related. A Latin club, a soccer team, and a school band would all clearly fall within this category." 130 Cong. Rec. H7732 (daily ed. July 25, 1984). Scuba diving is as much a sport as soccer, and school sponsorship of a diving club is perhaps even more important than of a soccer club because of safety considerations.

While *Amicus* does not suggest that every student activity could be arbitrarily classified as "curriculum-related" for purposes of the Equal Access Act, it does urge this Court to recognize that what is considered part of a school's curriculum may with good reason vary among school leaders and educators, from place to place and over time. Such determinations certainly should not reside with the courts.

IV. PETITIONERS' REFUSAL TO ALLOW RESPONDENTS TO MEET DOES NOT VIOLATE THEIR FREE SPEECH RIGHTS.

Since the Act is allegedly an attempt at codifying the free speech clause of the Constitution and this Court's decision in *Widmar v. Vincent*, the facts in that case should be compared with the facts in the case at bar, with the crucial question being whether Petitioners are operating a "limited open forum" under this Court's constitutional standards.

In *Widmar* the university had a written policy expressly allowing every student group to meet *except* religious groups. Over 100 groups were allowed to meet and apparently none of those groups were sponsored by the university. Arguably, in a very large high school with a diverse student body as many as 100 student organized and operated clubs could be present on campus. In that context it is unlikely that the students would perceive state sponsorship of a religious club in absence of a history of school sponsorship of other religious activities. But this situation will not, of course, exist on every high school campus. So, like other free speech issues, each case should be determined on its own merits.

In the *Widmar* case, if the university had a history of sponsoring religious activities similar to that of the Lubbock School District, the decision might have been different. The decision might also have been different had the school involved its faculty in the groups to the extent that Petitioners have done in this case. Nothing in *Widmar* indicates that the university could not have limited its forum to student groups which are sponsored by the school and directed by faculty. But, given the hands off policy of the university and the large number of secular clubs, the forum was limited only to the extent that only students could participate. Given those facts, refusing to allow religious clubs to meet violated the students' free speech rights. A similar situation at the secondary level could arguably produce a similar result.

However, the facts in the case at bar do not even remotely resemble those of *Widmar*. Furthermore, it is unlikely that such facts would ever be duplicated in a high school situation.

> The educational mission of a high school, in contrast [to the university], is more circumscribed. The curriculum consists less, and indeed is less conducive to, of an unfettered inquiry. As a secondary school, emphasis is placed more on a structured program "'for inculcating fundamental values necessary to the maintenance of a democratic political system.'" (Citations omitted) . . .
>
> Because of the inherent nature of a secondary school, any forum, created has purposes which are narrower, and uses more exclusive than a forum such as in *Widmar* or one open generally to all forms of communication by the public. In determining the type of forum, if any, created by secondary school authorities such as the Williamsport Area School District, therefore, we must take into account, among other things, the level of maturity of the students and the nature of the academic program involved. *Bender v. Williamsport Area School Dist.*, 741 F.2d 538, 548 (3d Cir. 1984).

A school district does not create a "limited open forum" accidently. In absence of some action by the school, the school is presumed during the school day to be a closed forum—open only to officially sanctioned and sponsored educational activities. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

Although some activities may be more closely related to the actual curriculum than others, that fact does not make them non-educational. For example, the Ninth Circuit Court of Appeals in the case of *Fraser v. Bethel School Dist. No. 403*, 755 F.2d 1356 (9th Cir. 1985), held that the school had created a public forum by allowing students to make campaign speeches for fellow student candidates during a student assembly called for that purpose. "To their credit, Bethel High School officials created an open forum for students to express their political views; when they did so they implicated the fundamental right of participation in the process of self-government, albeit a student government." *Id.* at 1365. The Supreme Court reversed. Justice Brennan, in a concurrence, noted that the school district's authority over the student's speech was limited to the "school environment." The key in that case was the fact that the assembly was school *sponsored*. Although it was not part of the curriculum itself, the assembly was sponsored by the school.

This Court also overturned a lower court ruling in *Hazelwood School District v. Kuhlmeier* holding that a school newspaper was a public forum. Citing *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, the Court ruled that the evidence did not "demonstrate the 'clear intent to create a public forum,' that existed in cases in which we found public forums to have been created [citations omitted.]" 108 S. Ct. at 569. The *Hazelwood* Court ruled that student activities "may

fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 570. The Court further stated, "[t]he question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker* —is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." *Id.* at 562.

Similarly, in the case at bar all the clubs at issue are related to the education mission of the school, sponsored by the school and directed by faculty and, therefore, are not part of an open forum.

The *Widmar* standard does not apply until it is clear that the school has established an open forum. Since the school in this case is actively sponsoring all of the student clubs, the forum remains closed and the school cannot be forced to allow non-sponsored student groups to meet on school premises during the school day. There is insufficient evidence in the record to support Respondents' contention that the school's sponsorship of the student activities is a sham designed to preclude the Respondent's club from meeting on school grounds. In absence of such evidence the school's determination to sponsor those groups, and only those groups, should stand.

Most, if not all, of the cases that have ruled that *Widmar* does not apply at the secondary level have done so on the basis of the impressionability of the students and the restrictive nature of the public school environment. The "impressionability" analysis is not particularly helpful in this context because the degree of impressionability will vary with the fact sitations. That, of course, is the major failing of the Equal Access Act—it attempts to place all schools and all students into neat little niches. It assumes that if the school allows one club which falls into some vague, but broad category of "noncurriculum related," that it is discriminating against

any other club that the school refuses to allow to meet. The Constitution does not allow such easy answers.

Because of the nature of the public school environment, which this Court has acknowledged on numerous occasions is nothing like that of the college or university, it is unlikely that the *Widmar* facts could be recreated in the context of public secondary schools. But, if they could, the impressionability argument would not be as forceful. Undoubtedly, high school students could differentiate between school sponsored and nonsponsored activities given the right facts. If a high school activities period could be found that paralleled the student activities policy in *Widmar*, it is unlikely that students in that situation would have the impression that the school is sponsoring all the clubs.

However, where the school sponsors all the clubs, all the clubs have an educational basis, all the clubs meet during the school day in the same school where all the classes meet—all of which is true here—adults as well as students are likely to perceive state sponsorship of the religious club. Certainly, a hypothetical fact situation can be created in which dozens of student clubs meet on high school property, at the complete discretion of the students, with no school sponsorship or other direct involvement and few would disagree that to refuse a religious club to meet under those circumstances would be discriminatory. But, that is not the issue here because those facts are not present here.

Under the facts of this case, we do not need to address the question of whether allowing the religious club to meet would establish religion. That issue would only arise in a case paralleling *Widmar* where the failure to allow the group to meet would violate their free speech rights. Free speech rights are not implicated here because the school does not operate a limited open forum.

As noted above, if the court of appeal's definition of noncurriculum related stands, then compliance with the Act in this case would have the primary effect of ad-

vancing religion. But, given a reasonable definition which gives schools broad discretion to determine what is curriculum related, the Act would not have such an effect and Westside High School would not be required under the Act to allow the religious club—or any other non-curriculum related club—to meet.

CONCLUSION

Amicus submits first, that the Equal Access Act is facially unconstitutional because the Congress did not have a secular purpose in passing it. And, if the court of appeal's broad interpretation of the Act stands, the Act is unconstitutional because it has a primary effect of advancing religion. Second, *Amicus* submits that because Petitioners are not operating a "limited open forum" under either a Constitutional analysis or under the Equal Access Act, they are not violating either the free speech clause of the Constitution or the Act. For one or all of those reasons, *Amicus* submits that the court of appeals decision should be reversed.

Respectfully submitted,

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